Province of
British Columbia

ANNUAL REPORT
1983/84

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

85-1085/

LAW REFORM COMMISSION OF BRITISH COLUMBIA

ANNUAL REPORT 1983/84

PRINTED BY
AUTHORITY OF THE LEGISLATIVE ASSEMBLY

LRC 73

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

The Commissioners are:

ARTHUR L. CLOSE—Vice-Chairman

BRYAN WILLIAMS, Q.C.

ANTHONY F. SHEPPARD

RONALD I. CHEFFINS

Thomas G. Anderson is Counsel to the Commission.

Frederick W. Hansford is Staff Lawyer.

Sharon St. Michael is Secretary to the Commission.

The Commission offices are located on the
5th Floor, Toronto Dominion Tower, Pacific Centre
700 West Georgia Street
P.O. Box 10135
Vancouver, B.C. V7Y 1C6

British Columbia Cataloguing in Publication Data

Law Reform Commission of British Columbia.
Annual report. -- 1981-

Continues: Law Reform Commission of British Columbia. Annual report of the Law Reform Commission of British Columbia. ISSN 0381-2510
Report year ends Mar. 31, 1983/84-
Report for 1983/84 covers Jan. 1, 1983-Mar. 31, 1984.
ISSN 0381-2510 = Annual report of the Law Reform Commission of British Columbia.

1. Law Reform Commission of British Columbia.
2. Law reform - British Columbia - Periodicals.

KEB168.A72L38 354.7110088

TABLE OF CONTENTS

PAGE

I Introduction 1

II Reflections on 1983/84 2

III The Program 3

A. *Carrying out the Program* 3

1. Research and Writing 3
2. The Consultation Process 3

B. *The Projects* 3

1. Debtor-Creditor Relationship Topics 3
   (a) Bulk Sales Legislation 3
   (b) Reviewable Transactions 4
   (c) Concurrent Liability 4
   (d) Court Order Interest Act 5
2. Personal Injury Compensation Topics 5
   (a) Compensation for Non-Pecuniary Loss 5
   (b) Family Compensation 5
3. The Applicability of English Statute Law 6
4. Civil Procedure Topics 6
   (a) Foreign Money Liabilities 6
   (b) Peremptory Challenges in Civil Jury Trials 7
   (c) The Review of Civil Jury Awards 7
   (d) Settlement Offers 7
   (e) The Jurisdiction of Local Judges of the Supreme Court: Stays of Execution and Instalment Orders 8
5. Estate Topics 8
   (a) Statutory Succession Rights 8
   (b) The Effect of Testamentary Instruments 8
   (c) Practice and Procedure in Estate Matters 8
6. The Office of the Sheriff 9
7. Contract Law Topics 9
   (a) Illegal Transactions 9
   (b) Covenants in Restraint of Trade 9
   (c) Performance Under Protest 9
   (d) Contractual Mistakes 10
   (e) Misrepresentation 10
8. Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case 10
9. Defamation 10
10. Mortgage Law Topics 11
    (a) Personal Liability under a Mortgage or Agreement for Sale 11
    (b) Mortgages of Land: The Priority of Further Advances 11
11. Legal Change and Prior Rights 11
12. I.C.B.C. Exclusions 11
13. Land Title Inquiry Act 12

TABLE OF CONTENTS — *Continued*

PAGE

14. Family Law Topics 12
    (a) Interspousal Immunity in Tort 12
    (b) Intentional Interference with Domestic Relations 12
    (c) Breach of Promise of Marriage 12
    (d) Land (Wife Protection) Act 13
    (e) New Family Law Topics 13
15. Subjects of Interest 14

IV Action on Commission Recommendations 14

V The Availability of Commission Publications 15

VI Acknowledgements 15

Appendix A—Reports and Recommendations made by The Law Reform Commission of British Columbia 18

Appendix B—Matters under Consideration 23

Appendix C—Minor Report: Standing of a Common Law Spouse to Apply under the Family Compensation Act (LRC 61) 24

Appendix D—Minor (Interim) Report: Land (Wife Protection) Act (LRC 71) 29

Appendix E—Minor Report: The Jurisdiction of Local Judges: Stays of Execution and Instalment Orders (LRC 72) 31

Appendix F—Commission Work Reviewed and Cited 35

To the Honourable Brian R. D. Smith, Q.C.
Attorney General of the Province of British Columbia

The Law Reform Commission of British Columbia has the honour to present its Annual Report for 1983/84. It outlines the progress made by the Commission during the 15-month period from January 1, 1983 to March 31, 1984.

I INTRODUCTION

The Law Reform Commission of British Columbia was created by the *Law Reform Commission Act*, S.B.C. 1969, c. 14 and it commenced operation in 1970. The function of the Commission is set out in section 2 of the Act:

> The Commission is to take and keep under review all the law in the Province including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law . . . .

The Commission's approach to this mandate has been described in its previous Annual Reports.

During the period under review, 12 final Reports were submitted to you on a variety of matters. Major Reports were made on the following topics:

Interspousal Immunity in Tort
Peremptory Challenges in Civil Jury Trials
Breach of Promise of Marriage
Foreign Money Liabilities
Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case
Bulk Sales Legislation
Intentional Interference with Domestic Relations
Illegal Transactions
Statutory Succession Rights

Recommendations were made in minor Reports submitted by the Commission on the following topics:

Standing of a Common Law Spouse to Apply under the *Family Compensation Act*
Land (Wife Protection) Act
Jurisdiction of Local Judges: Stays of Execution and Instalment Orders

During this period the Commission also issued seven Working Papers for criticism and comment. Of those Working Papers, the following have not yet been the subject of a final Report:

Covenants in Restraint of Trade
Compensation for Non-Pecuniary Loss
Review of Civil Jury Awards
Settlement Offers

The Commission also issued a major Study Paper on The Office of the Sheriff. These Reports and Papers are described in greater detail in Chapter III.

As presently constituted the Commission consists of four members: the Vice-Chairman, Arthur L. Close; and Mr. Bryan Williams, Q.C., Professor Anthony F. Sheppard, and Professor Ronald I. Cheffins. Messrs. Williams,

Sheppard and Cheffins serve on a part-time basis. Professor Cheffins appointment to the Commission took effect October 1, 1983. The details of the appointments of the other members may be found in the previous Annual Reports of the Commission.

II REFLECTIONS ON 1983/84

The period under review may be fairly described as the most productive in our history. This productivity was achieved, moreover, during a period of diminished resources for law reform. It could not have been accomplished without the industry and intelligence brought to their work by the Commission's full-time employees. In particular, the two full-time members of the Commission's legal research staff have rendered outstanding service. We wish to express our sincerest thanks to our Counsel, Thomas G. Anderson and Staff Lawyer, Frederick W. Hansford for their contribution to the work of the Commission.

Our 1982 Annual Report described the "funding crisis" which descended in that year and the generous and timely response of the Law Foundation of British Columbia to our request for funding assistance to sustain the operations of the Commission. In 1983, we again found it necessary to approach the Foundation for assistance with respect to our 1984/85 financial year. Despite other very heavy claims on its resources, the Foundation again responded generously. The Foundation grant, along with the operational and administrative support to be provided by Government, should be sufficient to sustain the work of the Commission until the end of March 1985.

The year 1983 also saw the departure of two valued members of the Commission. The Honourable Mr. Justice John S. Aikins joined the Commission as its Chairman in 1980. During the period he served as Chairman, although he remained a Supernumerary Justice of the British Columbia Court of Appeal, he was able to devote substantially his full time to the work of the Commission. He resigned as Chairman and Commissioner effective the end of 1983 in view of the ever increasing caseload of the Court of Appeal. At the final meeting over which he presided, the following motion was unanimously approved:

> On the occasion of the retirement of the Honourable Mr. Justice John S. Aikins as Chairman, the members of the British Columbia Law Reform Commission wish formally to record their deep sense of obligation to him for his service to the Commission and to the cause of law reform.
>
> He brought the Commission safely through a very turbulent and critical period of its existence. At the same time he ensured that the Commission remained productive and that the quality of its work continued to meet the high standards expected of it.
>
> Those who have had the privilege of working with him for the past 3-1/2 years pay him this tribute with respect and affection.

No successor to the Chairmanship has yet been appointed.

In 1983, we also lost the services of Kenneth C. Mackenzie whose term as a Commissioner expired in July. He joined the Commission in 1978 and served with distinction and dedication. He brought to our work a happy blend of scholarship, humanity and common sense and his contribution has been a significant one.

III THE PROGRAM

A. CARRYING OUT THE PROGRAM

1. Research and Writing

The research to carry out the program calls for time-consuming work by qualified people. This can be achieved by having the research done by personnel who are employed full-time or by persons with special expertise who are retained on a part-time or occasional basis. Although in the early years, the Commission relied heavily on outside consultants, our experience has led to a preference for the former approach. Consequently, most of the research and writing is now done by full-time members of the Commission staff.

One mechanism that is open to us, but which we have not used extensively in the past, is to create special committees to advise or report to the Commission on particular topics. The use of such committees is provided for in section 4 of the *Law Reform Commission Act*. One committee was constituted in 1983 and we are considering setting up committees for two further projects in the coming year.

2. The Consultation Process

The Commission makes a general practice of inviting comment and criticism of its research and analysis before submitting a formal Report to you on any particular subject. This process of consultation greatly assists the Commission in developing recommendations for the reform of the law that are both relevant and sound.

The chief means by which the Commission carries out this process is through the circulation of Working Papers to those who are knowledgeable, or who have a special interest in the subject under study. A Working Paper sets out the tentative views of the Commission, the background on which these views are based and invites comment. Occasionally, when the topic under consideration makes inappropriate the wide circulation of a Working Paper, copies of a draft Report may be given limited circulation for comment.

Whatever consultative mechanism is adopted, the tentative conclusions are thoroughly re-examined in the light of the comment and criticism received and final recommendations are developed accordingly.

B. THE PROJECTS

The description below is limited to those projects upon which Reports have been made in the past year or upon which work is in progress. Details of other Reports may be found in earlier Annual Reports. Included as Appendix A is a table setting out all Reports which the Commission has made to date, and references to legislation in which the recommendations have been implemented in whole or in part. In Appendix B, another table sets out those matters which are now under consideration.

1. Debtor-Creditor Relationship Topics

(a) *Bulk Sales Legislation*

When a merchant wishes to make a sale of a major portion of his assets out of the usual course of his business, that transaction will normally be one which must comply with the *Sale of Goods in Bulk Act*, R.S.B.C. 1979, c. 371. That Act imposes certain formalities on the transaction. The purchaser

must demand a list of the vendor's creditors and, before the sale can be consummated, they must be paid or a requisite number of them must consent to the sale or waive the protection of the Act. Where the Act has not been complied with, the vendor's unpaid creditors may call upon the purchaser to account for the goods and any proceeds realized on their resale.

The *Sale of Goods in Bulk Act* is one of a number of statutes dealing with debtor-creditor relationships enacted around the turn of the century to fill the void created by the absence of federal bankruptcy legislation at the time. Its aim is to protect unsecured creditors. The origins of the Act and contemporary commercial practice raise serious questions about its current operation and utility.

In a Report submitted in October 1983 (LRC 67) it was concluded that the goals of the Act, to the extent that they are achieved at all, are realized only at the cost of significant commercial inconvenience and disruption. The Report characterized the Act as "a response to the commercial needs and practices of a by-gone era" and recommended its repeal.

(b) *Reviewable Transactions*

This project comprises a study on the operation of the *Fraudulent Conveyance Act* and *Fraudulent Preference Act*. Background research on the law respecting the current operation of these Acts is far advanced, but much work remains to be done. We hope to be in a position to devote a substantial block of time to it in the coming year, but we cannot predict with confidence when we will be able to issue a Working Paper.

(c) *Concurrent Liability*

There are a number of ways in which two or more persons may become concurrently liable to satisfy a debt, pay damages or perform an obligation to or for a third party. The concurrent obligations need not necessarily be imposed on a common legal basis. One of the persons might be liable in tort and the other in contract or by reason of a breach of a statutory duty. The law respecting the rights of persons who may be concurrently liable to a third party both as against that third party and as against each other, is complex and highly technical.

In this project the Commission will examine a number of issues of concern in cases of concurrent liability. In particular, the utility of the present distinction between joint and several liability will be examined. This distinction can be crucial in two respects: first, a judgment obtained against one of a number of defendants jointly liable will bar any action against other possible defendants, while if liability is several no such bar exists; and, second, if defendants are jointly liable execution may be taken against any defendant for the whole of the damage award.

We shall also be examining the impact of the *Negligence Act* on apportionment of liability and rights of contribution, having particular regard to the provisions of the *Uniform Contributory Fault Act* recently promulgated by the Uniform Law Conference.

The procedural rules governing the joinder of parties will also be considered with a view to ensuring that, so far as is practicable, no substantive difference will result depending on the manner in which a person jointly liable comes to be a party to the litigation. We hope to give this topic concerted attention during the coming year.

(d) *Court Order Interest Act*

Early in 1983, the former Attorney General requested that the Commission "undertake a review of the *Court Order Interest Act* and, in conjunction with an examination of the *Uniform Judgment Interest Act*, consider whether all or parts of the Uniform Act should be incorporated in our legislation." Work is underway on this reference and the Commission hopes to circulate a Working Paper in 1984.

2. PERSONAL INJURY COMPENSATION TOPICS

(a) *Compensation for Non-Pecuniary Loss*

This project, which was undertaken at the request of the former Attorney General, concerns the "rough upper limit" of $100,000 with respect to pain, suffering and loss of amenities in personal injury actions said to be established by the "trilogy" of Supreme Court of Canada cases in 1978.

Those cases, and subsequent developments, were examined by the Commission in a Working Paper circulated in September of 1983 (W.P. 43). In the Working Paper, it was tentatively proposed that a new upper limit of $400,000 (as of April 1983) be established as the reference point. Submissions are presently being received and our consultation continues. We expect to commence work toward the preparation of a final Report shortly.

(b) *Family Compensation*

Under the *Family Compensation Act* an action may be brought in respect of a person's death where it is caused by the wrongful act of another. The action may be brought only for the benefit of certain near relatives of the deceased, and the claim is limited to the loss of future pecuniary benefits that the deceased would have provided. A number of aspects of the Act and its operation will require study. These include what the proper basis of compensation should be and who should have status to bring an action.

A related issue is whether compensation to family members should be limited, as it is at present, to cases involving death. Functionally, it is difficult to distinguish between the case in which a wrongdoer causes the death of a family member and the case in which he renders a family member permanently comatose. The rights of family members, however, may vary drastically depending on whether or not death occurs, particularly since the action for loss of consortium has been abolished by section 75 of the *Family Relations Act*.

In 1983-84, our work on this topic has been in two parts. First, in response to litigation which raised an issue calling for immediate action, we submitted a minor Report (LRC 61) concerning the status of the so-called "common law spouse" to apply for relief under the *Family Compensation Act*. We recommended that a common law spouse should have status to pursue a claim under the Act. The full text of this minor Report is set out as Appendix C to this Report.

In the meantime, we have turned to a broader examination of the *Family Compensation Act* and a consideration of the issues described above. Our work is now well advanced and we hope to circulate a Working Paper by the autumn of 1984.

3. The Applicability of English Statute Law

Section 2 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224 provides that the laws of England, as they existed on November 19, 1858 are in force in British Columbia to the extent that they are not inapplicable through local circumstances and have not been repealed or superseded by federal or provincial legislation. It follows from this that an uncertain number of English statutes are in force in this Province.

The aim of this project is to introduce a degree of certainty concerning the extent to which English statute law is in force here. We hope to identify those statutes which are in force, with a view to rationalizing this aspect of our statute law.

This has always been recognized as a long-term project and much of our work has been devoted to gathering background information. Considerable progress has been made in organizing these materials, and a preliminary list of statutes has been established.

During the period under review, the pressure of other projects precluded any concentrated work on this study, and this situation is likely to continue for some time. We wish, however, to reaffirm our commitment to the project and hope that those awaiting a Report will bear with us.

4. Civil Procedure Topics

(a) *Foreign Money Liabilities*

From time to time, a Canadian court will hear a case in which the plaintiff's claim is properly stated in a foreign currency. This foreign currency element may reflect an agreement between the parties or result from the circum stances in which the defendant's liability arose. A common example is the purchase of goods by a Canadian from a foreign supplier, with the purchase price to be paid in the supplier's currency. In times of rapidly fluctuating currency exchange rates the rules which the courts apply to determine the nature and extent of the defendant's liability may be of crucial importance to the parties.

Until the beginning of the last decade, the Anglo-Canadian law concerning foreign currency claims seemed firmly settled. Two propositions were cited as fundamental. The first was that the courts have no authority to enter money judgments in terms of a "foreign" currency—that is, a currency other than that of the forum. The second was that in converting from a foreign currency to the currency of the forum, the court should have regard to the exchange rate that prevailed on the date of breach—the date the loss was suffered by the plaintiff or when the obligation to him became payable.

This legal position has recently undergone a radical change in England. A series of cases in the 1970's culminated in *Miliangos* v. *George Frank (Textile) Ltd.*, [1976] A.C. 443, in which the House of Lords declared that it would be permissible to enter judgment directly in a foreign currency or its sterling equivalent at the date of payment. This change in the law, which had been advocated for many years by knowledgeable commentators, has been well received by the commercial community in England and appears to have worked well in practice.

In a Report (LRC 65) submitted in September 1983 the English developments were examined in a Canadian context. The Report endorsed these developments but concluded that legislation would be necessary to achieve

similar reforms in British Columbia. Recommendations were made concerning the content of such legislation.

(b) *Peremptory Challenges in Civil Jury Trials*

In a civil action that will be heard by judge and jury, both plaintiff and defendant may exercise certain powers to determine whether a prospective juror may be included in the jury. Any party may challenge a prospective juror for cause. If the juror is not qualified under the *Jury Act*, or is personally interested in the case or otherwise biased, he should not be part of the jury. Provided the parties are aware of cause, they may challenge on that basis.

In many cases, however, parties will not have that information. Consequently, in addition to challenges for cause (which are unlimited) each party may exercise four peremptory challenges. A peremptory challenge is merely the right to forbid, without reasons, a person from sitting on the jury.

The right to make a peremptory challenge is provided by section 18 of the *Jury Act*. Problems arise from that section. For example, if there are two defendants, may they each exercise four peremptory challenges, or must they share those challenges? In what order should challenges be exercised, as between plaintiff and defendant, and as between several plaintiffs and several defendants? Is a third party to the action entitled to exercise peremptory challenges? Because these issues are either unresolved or not addressed in the *Jury Act*, they can lead to procedural arguments each time they arise, contributing to delays in the administration of civil justice.

In June 1983 a Report (LRC 63) on this topic was submitted. The Report sets out recommendations aimed at rationalizing the entitlement to peremptory challenges in civil jury trials where multiple parties are involved.

(c) *The Review of Civil Jury Awards*

Although the role of the civil jury is to make findings of fact in the case before it, in certain circumstances the law may permit the trial judge to take the case away from the jury or to direct a new trial. The Court of Appeal also has jurisdiction in some cases to review jury awards. The circumstances when the trial judge or the Court of Appeal may intervene, however, are fairly circumscribed and, even where the circumstances clearly warrant judicial intervention, the procedures which surround it and the results which flow from it often result in unnecessary cost and expense to the parties.

In September 1983 a Working Paper (W.P. 44) was circulated which set out a tentative proposal that the presiding Trial Judge be given a limited jurisdiction to review the award of a civil jury in respect of quantum, comparable to the jurisdiction presently exercised by the Court of Appeal. This proposal would have its greatest impact with respect to personal injury claims. Submissions are presently being received and the Commission expects shortly to commence work toward the preparation of a final Report.

(d) *Settlement Offers*

The Rules of Court provide a number of mechanisms designed to facilitate the compromise of litigation. These include offers to settle and payment into court. In January 1984 we circulated a Working Paper (W.P. 45) which examined a number of possibilities for refining and extending these mechanisms. Responses are currently being received and we expect to commence work toward the preparation of a final Report later in 1984.

(e) *The Jurisdiction of Local Judges of the Supreme Court: Stays of Execution and Instalment Orders*

It was recently pointed out to us that Local Judges of the Supreme Court have only a limited jurisdiction, under the Rules of Court, to order a stay of execution or that a judgment for the payment of money be payable by instalments. This creates difficulties in judicial centres where there is not a Justice of the Supreme Court sitting continually. In February 1984 we submitted a minor Report (LRC 72) on this topic recommending an extended jurisdiction for Local Judges with respect to these matters. The full text of this minor Report is set out as Appendix E to this Report.

5. Estate Topics

(a) *Statutory Succession Rights*

The right of a person to succeed to the property of another on death may arise by will or by statute. Our Reports on the Making and Revocation of Wills and on the Interpretation of Wills concerned testamentary succession rights. This project concerns rights which flow from statute and which exist regardless of a deceased person's intent.

Legislation affects succession rights in a number of ways. Two statutes in particular have a profound effect of the devolution and distribution of property. *The Estate Administration Act* governs succession when the deceased failed to make a will validly disposing of all of his property. *The Wills Variation Act* empowers the courts to vary testamentary dispositions in order to provide adequately for the deceased's spouse and children. Criticism has been directed at both of these statutes. Neither has kept pace with changing economic and social conditions, and each fails, at least in part, to answer contemporary social needs.

In December 1983, the Commission submitted a final Report (LRC 70) on this topic which considered these two statutes, as well as other legislation which affects succession rights. Recommendations were made to modernize the law as well as to ensure that the various statutes operate consistently.

(b) *The Effect of Testamentary Instruments*

Even where the testator's original intent is beyond dispute, events may occur which render it impossible to give effect to his intent. A beneficiary may predecease the testator. Property disposed of by will may have become altered in form. In this part of the Estates Project the Commission will examine a number of issues arising out of such occurrences. In particular, we will examine the legal rules concerning lapse, ademption, conversion, election and disclaimer.

(c) *Practice and Procedure in Estate Matters*

It is planned that this study will examine the law concerning the procedure used in obtaining letters probate and letters of administration, and the law relating to the administration of estates. The Commission is in the process of developing terms of reference for the study. It is proposed to constitute a special committee under section 4 of the *Law Reform Commission Act* to examine the issues and to assist the Commission with the views and experience of committee members.

6. The Office of the Sheriff

In December 1983, the Commission published a major Study Paper on this topic. The paper contains a comprehensive examination of the powers and duties of the sheriff and the current practices in the day-to-day operation of the sheriff's office in British Columbia and in other jurisdictions. It also sets out a historical review of the evolution of the sheriff's office.

The paper is the work of Gordon Turriff, District Registrar of the Supreme Court of British Columbia at Vancouver, and Associate Professor Elizabeth Edinger of the Faculty of Law, University of British Columbia. In addition to the extensive expository material, the authors identify certain problems and suggest solutions which may be helpful to the Legislature and those responsible for the administration of sheriff services in this Province. The recommendations are solely those of the authors and are not recommendations of the Commission.

The Commission wishes to acknowledge the role of the Law Foundation of British Columbia which provided major financial support for this study.

7. Contract Law Topics

(a) *Illegal Transactions*

As a general rule, Canadian courts decline to grant relief to parties who have either deliberately or unwittingly entered into an "illegal" transaction. The law concerning when a transaction may be characterized as illegal, and the exceptions to the general rule, is uncertain and inconsistent. It may be doubted whether the drastic results which flow from characterizing a transaction as "illegal" are necessary to uphold public policy.

In November 1983, a Report (LRC 69) was submitted in which we examined the general rule governing illegal transactions and made recommendations for its reform. In particular, it was recommended that legislation be enacted which gives the court broad and flexible powers to readjust the rights of parties to an illegal transaction.

(b) *Covenants in Restraint of Trade*

This study is an offshoot of our work on illegal transactions. Covenants in restraint of trade present peculiar legal problems, and accordingly we thought they warranted separate treatment. Typically, such convenants arise in the context of the sale of a business and its goodwill and require that the seller not carry on a competing business. The law in this area in difficult and complex.

A Working Paper (W.P. 41) on this topic was circulated in March 1983. It was tentatively proposed that the courts be permitted to enforce, in modified form, certain covenants which would be wholly void at common law. The responses to the Working Paper have been considered and the decisions taken which will form the basis of the final Report. We expect to submit the final Report in the spring of 1984.

(c) *Performance Under Protest*

When two parties to a contract disagree as to the nature or extent of the obligations which it imposes on one party, often the most sensible course is for the party to perform "under protest" in accordance with the wishes of the other party, with the issue of his entitlement to any additional compensation for that performance to be litigated or settled at a later date. The decision of the

Supreme Court of Canada in *Peter Keiwit Sons Co. of Canada* v. *Eakins Construction Ltd.*, [1960] S.C.R. 361, 22 D.L.R. (2d) 465, however, raises some doubt as to the circumstances in which this course of action is open. In 1983 we added to our program a short project to examine the implications of the *Keiwit* case and to make such recommendations for reform as may seem desirable.

(d) *Contractual Mistakes*

A tangled and troubled area of contract law is that relating to mistake. This may include mistake as to the terms, subject matter or the identity of the parties involved. A mistake may be common, mutual, or unilateral.

In New Zealand, legislation has been enacted aimed at clarifying the rights of the parties in these circumstances. In this project we propose to examine the New Zealand legislation in a Canadian context to determine if similar reform is desirable in British Columbia.

(e) *Misrepresentation*

In 1984 a project was added to the Commission's program which examines the desirability of enacting legislation comparable to the *Misrepresentation Act, 1967 (U.K.)*.

8. Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case

When trust monies are mingled in a single trust account, and the balance falls below the amount required to satisfy or repay the trust monies, the courts may determine entitlement to the fund by applying the rule in *Clayton's Case; Devaynes* v. *Noble*, (1816) 1 Mer. 572, 35 E.R. 767. This rule provides a presumption that the sum first paid into the account is the sum first paid out.

The rule works well for many purposes but it operates harshly when the monies of more than one beneficiary are mixed in a fund which is depleted and the competition is between innocent parties. A beneficiary may be required to bear the entire shortfall, merely because his money was deposited first in time.

In September 1983, we submitted a Report (LRC 66) with recommendations to modify the application of the rule in *Clayton's Case*. We also examined the principles governing tracing in equity and made recommendations directed toward resolving anomalies in that area of the law.

9. Defamation

In 1982, the Commission added a general study of the law of defamation to its program. In the past, the Commission has examined discrete aspects of that body of law such as cable television and defamation and the need for a larger study was pointed out in our Report on that topic (LRC 50).

In 1983, a committee was established under section 4 of the *Law Reform Commission Act*, to consider a number of aspects of the law of defamation and to report to the Commission with recommendations for its improvement. The Committee consists of the following persons:

Bryan Baynham, Chairman
Barrie Adams
Professor Jerome Atrens
Peter Butler, Q.C.
Rees Brock, Q.C.
David Gooderham
John Laxton
Kenneth C. Mackenzie
The Hon. Mr. Justice Murray
Anthony J. Spence
The Hon. Mr. Justice Taylor
Bryan Williams, Q.C.

The work of the Committee is well under way and a number of productive meetings have been held. The committee expects to submit its Report to the Commission in the autumn of 1984.

10. Mortgage Law Topics

(a) *Personal Liability under a Mortgage or Agreement for Sale*

The recent drastic increase in the volume of foreclosure proceedings being heard in our courts has brought to light certain difficulties and deficiencies in the law relating to foreclosure practice. Questions relating to the judgment on the borrower's covenant have proved to be particularly troublesome. A short project on this topic was added to our program in 1984.

(b) *Mortgages of Land: The Priority of Further Advances*

A mortgage of land will frequently provide that the land shall stand as security for a number of advances of money from the lender to the borrower. The lender, however, does not always obtain priority for his further advances over an intervening encumbrancer. In this situation priorities are governed by section 24 of the *Property Law Act*, R.S.B.C. 1979, c. 340. A preliminary examination of that provision suggests that it frequently has an adverse effect with respect to particular kinds of mortgages such as those given to secure a running account or those given to finance the construction of a building. There also appear to be a number of technical difficulties with the section.

In 1984, a project on this topic was added to our program and we hope to be circulating a Working Paper later this year.

11. Legal Change and Prior Rights

Rights and obligations which are acquired under the law as it exists at any given time are not lightly to be tampered with. When the law is consciously changed, as through legislation, the change normally has only a prospective effect. Where legislation is made to operate retroactively, it is usually only after the parties affected have had some notice that the change is going to be implemented or where the issue of prior rights has been carefully considered and a conscious policy decision arrived at.

Sometimes, however, legal change can come suddenly and unexpectedly. It may occur, for example, where an appellate court makes a pronouncement which creates a *de facto* change in the law. It may happen where a statute or bylaw under which parties have acquired rights and obligations is declared to be *ultra vires*. What is, or should be, the legal position of a party who is affected by this kind of legal change? That is the subject matter of a project that was tentatively added to our program in 1984. In the coming year we will be examining it more closely and developing terms of reference for a possible study.

12. I.C.B.C. Exclusions

From the point of view of the insured, the main function of automobile insurance is to insulate him from the financial catastrophe that could flow from a large judgment against him for negligence or fault in the operation of an automobile. The automobile insurance scheme in this Province, however, places some limitations on the circumstances in which the insured will, in fact, have that protection. In particular, when the insured has been found guilty of certain kinds of breaches of the law and his conduct results in a claim

by a third party, the Insurance Corporation of British Columbia is entitled to recover from the insured the amount which it has been compelled to pay to the third party for loss arising out of the incident.

The conduct which deprives the insured of his right to indemnity is specified in the regulations to the *Automobile Insurance Act*. With respect to some kinds of conduct, the behaviour of the insured clearly warrants his being placed beyond the protection of the policy. In other cases, however, the culpability of the insured may be less clear-cut. In 1983, we added to our program a short project aimed at examining the circumstances in which an insured should be deprived of the protection of his automobile insurance policy. We hope to circulate a Working Paper late in 1984.

13. Land Title Inquiry Act

The *Land Title Inquiry Act*, in one version or another, has been in force in the Province since the 1890's. It provides for actions declaring title to land to be brought in a summary fashion. Applications under the Act are few and far between, partly because an application may not be brought with respect to land within our land title system (*Re Quieting Titles Act*, [1967] 61 D.L.R. (2d) 642; B.C.S.C.). Today the only application of the Act may be to cases of accretion or unregistered land.

Questions have been raised whether the summary procedure set out in the *Land Title Inquiry Act* is useful. Similar procedures exist in the current Rules of Court. In 1984 a project on the Act was added to our program. We will consider whether the Act might be repealed or in a considerably modified form, be merged with other legislation.

14. Family Law Topics

(a) *Interspousal Immunity in Tort*

In British Columbia, one spouse cannot sue the other in tort. This rule is enshrined in section 10 of the *Married Woman's Property Act*. When first enacted almost 100 years ago, this provision represented an improvement over an even more restrictive common law position. Today the rule is an anachronism.

In March 1983, we submitted a Report (LRC 62) which examined this rule and its consequences. We recommended that it be replaced by a new and modern statement of the law concerning the rights of spouses to sue each other. We also examined the implications of a change in the rule, and made recommendations, with respect to insurance legislation, insurance contracts and contributory fault.

(b) *Intentional Interference with Domestic Relations*

A final Report (LRC 68) on this topic was submitted in November 1983. The Report considers the extent to which it is necessary or desirable for the law to provide remedies such as damages for adultery, seduction, and the enticement or harbouring of a spouse or child. The Report concluded that these actions are anachronistic and largely ineffective and their abolition was recommended.

(c) *Breach of Promise of Marriage*

A broken promise to marry is attended by many of the consequences of a breach of a commercial contract. The extent to which it is necessary or desirable for the law to provide remedies upon the end of an engagement is

questionable. In August 1983, we submitted a final Report (LRC 64) which examined this issue and concluded that the common law action for breach of promise of marriage should be abolished.

(d) *Land (Wife Protection) Act*

Under the *Land (Wife Protection) Act*, a wife may cause a filing to be made against land registered in the name of her husband. The effect of a filing is to limit the way in which the husband can dispose of or deal with the land. The Act confers no corresponding right on the husband to file against land registered in the name of his wife.

There are a number of features of the Act which call for critical study, but any detailed work on the Act should await the outcome of other studies concerning family property. The difficulty is that the Act, on its face, appears to violate section 15(1) of the *Charter of Rights and Freedoms* which comes into force on April 17, 1985. If the Act, in its present form, were tested against the Charter there is a serious possibility that it might be struck down in its entirety.

Given the urgency of the Charter issue, in January 1984, we submitted a minor Report (LRC 71) recommending that, as an interim measure, husbands be given corresponding privileges under the Act. The full text of the minor Report is set out as Appendix D to this Report.

(e) *New Family Law Topics*

In November 1983 a tentative decision was taken to add to our program a number of new topics which touch on family law matters. The decision was tentative in the sense that a closer examination might reveal that no reform measures are called for or that the Commission is not the proper body to develop recommendations for reform. The topics tentatively identified are:

(i) the financial consequences of marriage breakdown: support obligations and family property;
(ii) the legal effect of a spousal adoption on the non-adopting former spouse;
(iii) the wife's domicile of dependency;
(iv) the need for a modern restatement of the law contained in the *Married Woman's Property Act;*
(v) the need for a modern restatement of the law respecting guardianship currently contained in section 25 of the *Family Relations Act;*
(vi) the observance of time limitations for hearings under the *Family and Child Services Act*.

Of the topics listed above, that concerning the financial consequences of marriage breakdown is obviously the largest and most difficult. As a preliminary step, the Commission has engaged Mr. Michael Karton, of the Vancouver Bar, to prepare a survey of the current jurisprudence and practice surrounding the provisions of the *Family Relations Act* concerning family property and the complimentary provisions concerning support obligations. This survey we expect will serve both as a "source document" and as part of the terms of reference for the work which follows. The question of the best way of approaching this topic remains open. One possibility being given consideration is the constitution of a committee under section 4 of the *Law Reform Commission Act*.

15. Subjects of Interest

Preliminary research or the gathering of material regularly proceeds on a number of matters which are not yet part of the Commission's program. In most cases this is to determine if a particular topic is appropriate for formal inclusion in the program as a Commission project. Many of these matters which are under preliminary consideration arise out of particular suggestions made, and problems drawn to the Commission's attention, by the legal profession and members of the public.

IV ACTION ON COMMISSION RECOMMENDATIONS

If a proper measure of a law reform agency's success is the extent to which its recommendations are adopted and implemented by the Legislature, then the British Columbia Law Reform Commission has an enviable record. Historically, its implementation record has been as good as, or better than, that of any comparable agency in Canada.

An examination of the Commission's implementation record four years ago indicated that almost two-thirds of its Reports had been acted on. A recent examination reveals that the implementation rate now stands at something less than 50%. In a sense, numerical comparisons can be misleading. There is a distinction to be drawn between implementation which calls for new and lengthy legislation and that which calls for a single section in the *Law and Equity Act*. Similarly, there is a qualitative difference between legislation which implements a minority of recommendations contained in a Report and legislation which implements a majority of those recommendations. These are factors which are difficult to quantify. Nonetheless, the figures do suggest that in recent years the Legislature has not kept pace with the work of the Law Reform Commission. This trend continued during 1983-84 and little or no progress was made in implementing Commission recommendations.

A government's failure to implement the recommendations of a law reform agency can have a serious impact on its credibility. On the other hand, a good record of implementation will enhance its effectiveness. For example, the ability of the agency to consult effectively with interested persons and groups is considerably greater when the agency is regarded as one whose advice commands attention. It is not suggested that the credibility of the British Columbia Law Reform Commission has yet become impaired or is likely to become impaired in the short term. This possibility, however, has become a matter of increasing concern to the Commission members.

We were, therefore, encouraged to learn of the recent remarks of the Attorney General as reported in Hansard for April 5, 1984:

> On the subject—often esoteric, I guess—of law reform, Mr. Chairman, I do believe there is a great deal of law reform yet to be done in this province. We have a law reform commission which has worked away at making recommendations—some technical, some of a broad nature—to government for a number of years on how the civil law in this province might be reformed. That commission has produced some fine work. Some of its recommendations have been implemented, but, as the members of this House and my critic will know, many of the recommendations over the years didn't get implemented. I have found that a matter of some concern and I have asked for a review of all those recommendations. It is my hope and expectation that we can deal with some of the still very good recommendations of that commission in an omnibus bill, and that we can do so in a bipartisan way to bring forward some of the fruits of the commission

> which, I guess for reasons of legislative program or other priorities, have not been given the enactment that they should have. I make it a priority to make some gains in law reform. I think law reform is important and we must encourage the work of that commission. A commission that is independent of government and that provides government and the Legislature with advice in this field is highly valuable.

We welcome this expression of the Attorney General's commitment to the work of the Commission and the desirability of implementation.

V THE AVAILABILITY OF COMMISSION PUBLICATIONS

All final Reports on major topics issued by the Commission have been published in a typeset format, with the intention that they be available to the public. Our Annual Reports are distributed by the Commission and are available on request and free of charge so long as stocks last.

From time to time the Commission also submits minor Reports, in the form of a letter to the Attorney General. These minor Reports are usually reproduced in full as appendices to the Annual Report which covers the period in which the minor Report was made.

The Provincial Queen's Printer is responsible for the distribution of all Reports made by the Commission on particular topics. A nominal charge is made for copies of those Reports. Orders and inquiries as to prices should be directed to:

The Queen's Printer
Publications
Parliament Buildings,
Victoria, B.C., V8V 4R6
Telephone: 387-1901

A number of our early Reports are now out of print and are not available for purchase. Those Reports are indicated with an asterisk in Appendix A.

The Queen's Printer maintains a "notification list" and upon publication of a Commission Report, all persons on the list are so advised. Anyone who wishes to be added to that list should contact the Queen's Printer.

Working Papers are produced in a typescript format by an offset process and the Commission is responsible for their distribution. Working Papers are usually produced in limited quantities and our supplies of them are invariably exhausted by, or shortly after, their initial distribution. Usually we are unable to respond to requests either for copies of past Working Papers or to be placed on a mailing list to receive copies of all Working Papers.

VI ACKNOWLEDGEMENTS

As we have pointed out in previous Annual Reports, our policy of doing the greater part of our research work internally, rather than relying upon outside consultants, has placed a heavy burden of responsibility upon the shoulders of our permanent staff. As usual they have responded to the challenge with energy, enthusiasm and careful scholarship. We wish to repeat our thanks to the members of our current research staff, Messrs. Thomas G. Anderson and Frederick W. Hansford, for the loyalty and industry they have devoted to the affairs of the Commission.

Our support staff also make a notable contribution to the work of the Commission. They bring intelligence and efficiency to their duties and share a concern that our work should be of the highest quality in every respect. Our support staff presently consists of Sharon St. Michael, Secretary to the Commission, and Terry Lesperance, clerk-stenographer. We thank them for their efforts on our behalf.

Special mention should also be made of two other individuals. The first is J.C. Scott-Harston, Q.C., who has acted as our consultant in connection with our estates projects. His wide learning and long experience have been a great asset to us. The second is Ms. Anne Shields, a third year law student who was engaged by the Commission for the summer of 1983. She cheerfully undertook a significant portion of the more tedious work of verifying authorities and other technical editorial aspects of producing a Commission document. We are happy to have had her with us.

The Judges' Law Reform Committee is also important to our operation. This Committee provides a continuing point of contact with the judiciary. The members of the Committee are The Honourable Mr. Justice Lambert of the Court of Appeal (Chairman), The Honourable Mr. Justice Taylor, The Honourable Mr. Justice Spencer and The Honourable Mr. Justice Macdonald of the Supreme Court, His Honour Judge Collings of the Provincial Court, and The Honourable Judge Huddart of the Vancouver County Court. The members of the Committee assist us through responding to our Working Papers and other consultative documents and through bringing to our attention defects in the law that they are well-situated to identify. They bring a unique perspective to bear on our work and we are grateful for their participation.

The support which we have received from the organized bar and its individual members in past years has continued. We rely heavily on the assistance of the legal profession in a number of ways. At the research stage of our projects, individual lawyers assist us in gathering facts and in acting as a "sounding board" with respect to various approaches to difficult issues. Requests for help of this kind are invariably the subject of a generous response. At the more formal stage of consultation, various Sections of the British Columbia Branch of the Canadian Bar Association assist us in our deliberations with thoughtful submissions on the various proposals and tentative conclusions set out in our Working Papers. We wish to thank all members of the bar who gave generously of their time and experience in the past year.

The two law faculties in the Province have also greatly assisted us in our consultation processes. Procedures have been established which facilitate and co-ordinate comment from faculty members. The response we have received in this way has been most valuable. We wish particularly to thank Dean Peter Burns of the Faculty of Law, University of British Columbia and Dean L.R. Robinson of the Faculty of Law, University of Victoria and their colleagues.

Two agencies of Government also call for special mention. The first is the Office of Legislative Counsel. Their personnel are invariably responsive and helpful when we request assistance in the preparation of proposed legislation. The draft *Illegal Transaction Act* appended to our *Report on Illegal Transactions* reflects the drafting skills they have put at our disposal.

The other agency is the Queen's Printer who is responsible for printing our Reports. Its personnel bring a high level of skill, dedication and professionalism to the work they do for us and we are pleased to take this opportunity to thank them and acknowledge their important role.

We also wish to repeat our sincere thanks to the Law Foundation of British Columbia for responding positively to our requests for funding. The support of law reform is listed as one of the Foundation's objects in the statute under which it is constituted. In enabling the Law Reform Commission to carry on with its functions, the Law Foundation has truly fulfilled that object and rendered an important service to the people of the Province. Our particular thanks go to Mr. Norman Severide, Chairman of the Foundation, and Mr. Michael Jacobsen, its Executive Director.

Finally, we wish to thank you Mr. Attorney and all those within the Ministry who, during the period under review, in their dealings with the Commission on a day-to-day basis, have contributed to our work and made life easier. In particular, our thanks go to your predecessor, The Honourable L. Allan Williams, Q.C., Mr. Richard H. Vogel, Q.C., the former Deputy Attorney General, The Honourable E.N. Hughes, Q.C., the present Deputy Attorney General, and Associate Deputies, Messrs. Robert Adamson and Frank Rhodes. All have, in one way or another, assisted us greatly.

ARTHUR L. CLOSE
BRYAN WILLIAMS
ANTHONY F. SHEPPARD
RONALD I. CHEFFINS

26 April 1984

Appendix A

REPORTS AND RECOMMENDATIONS MADE BY THE LAW REFORM COMMISSION OF BRITISH COLUMBIA

No.	Title	Date	Recommendations Implemented in Whole or in Part by
1	Limitations—Abolition of Prescription*	Dec. 1970	*Land Registry (Amendment) Act, 1971*, S.B.C. 1971, c. 30, s. 8 (see now *Land Title Act*, R.S.B.C. 1979, c. 219, s. 24).
2	Annual Report, 1970*	Dec. 1970	Not applicable.
3	Frustrated Contracts Legislation*	Feb. 1971	*Frustrated Contracts Act*, S.B.C. 1974, c. 37 (see now *Frustrated Contract Act*, R.S.B.C. 1979, c. 144); *Landlord and Tenant Act*, S.B.C. 1974, c. 45, s. 61(e) (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365 s. 8(3)); *Commercial Tenancies Act*, R.S.B.C. 1960, c. 207, s. 34 (see now *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 33).
4	Debt Collection and Collection Agents*	Mar. 1971	*Debt Collection Act*, S.B.C. 1973 c. 26 (see now *Debt Collection Act*, R.S.B.C. 1979, c. 88).
5	Expropriation*	Dec. 1971	——
6	Annual Report, 1971*	Dec. 1971	Not applicable.
7	Mechanics' Lien Act*	June 1972	——
8	Deficiency Claims and Repossessions*	June 1972	*Conditional Sales Act*, S.B.C. 1973, c. 19 (see now *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373); *Bills of Sale Act*, S.B.C. 1973, c. 7 (see now *Chattel Mortgage Act*, R.S.B.C. 1979, c. 48).
9	Legal Position of the Crown*	Dec. 1972	*Crown Proceedings Act*, S.B.C. 1974, c. 24 (see now *Crown Proceeding Act*, R.S.B.C. 1979, c. 86); *Interpretation Act*, S.B.C. 1974, c. 42, s. 13 (see now *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14).
10	Annual Report, 1972	Dec. 1972	Not applicable.
11	Interim Report on Evidence*	Feb. 1973	*Attorney-General Statutes Amendment Act, 1975*, S.B.C. 1975, c. 4, s. 6 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, ss. 37, 38).
12	Pre-Judgment Interest*	May 1973	*Prejudgment Interest Act*, S.B.C. 1974, c. 65 (see now *Court Order Interest Act*, R.S.B.C. 1979, c. 76).

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
13	Landlord and Tenant—Residential Tenancies*	Dec. 1973	*Landlord and Tenant Act*, S.B.C. 1974, c. 45 (see now *Residential Tenancy Act*, R.S.B.C. 1979, c. 365).
14	Annual Report, 1973	Jan. 1974	Not applicable.
15	Limitations—General*	Mar. 1974	*Limitations Act*, SB.C. 1975, c. 37 (see now *Limitations Act*, R.S.B.C. 1979, c. 236).
16	Costs of Accused on Acquittal*	June 1974	——
17	Procedure Before Statutory Bodies*	Nov. 1974	——
18	A Procedure for Judicial Review of the Actions of Statutory Bodies*	Dec. 1974	*Judicial Review Procedure Act*, S.B.C. 1976, c. 25 (see now *Judicial Review Procedure Act*, R.S.B.C. 1979, c. 209).
19	Annual Report, 1974	Jan 1975	Not applicable.
20	Costs of Successful Unassisted Lay Litigants*	Apr. 1975	——
21	The Termination of Agencies*	Apr. 1975	——
22	Powers of Attorney and Mental Incapacity*	May 1975	*Attorney-General Statutes Amendment Act*, 1979, S.B.C. 1979, c. 2, s. 52 (see now *Power of Attorney Act*, R.S.B.C. 1979, c. 334, s. 7).
23	Personal Property Security*	Oct 1975	——
24	Security Interests in Real Property: Remedies on Default*	Dec. 1975	*Miscellaneous Statutes (Court Rules) Amendment Act*, S.B.C. 1976, c. 33, s. 94(a) [in part] (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 16), Supreme Court Rules, Rule 50 (11), 3(2) [in part]; *Land Titles Act*, S.B.C. 1978, c. 25 [in part] (see now *Land Title Act*, R.S.B.C. 1979, c. 219); *Attorney General Statutes Amendment Act*, S.B.C. 1980, c. 1, s. 15 (see now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 21.1) [in part].
25	Annual Report, 1975	Jan. 1976	Not applicable.
26	Minors' Contracts*	Feb. 1976	——
27	Extra-Judicial Use of Sworn Statements*	Apr. 1976	*See*, e.g., *Mineral Act, 1977*, S.B.C. 1977, c. 54, s. 20(2).
28	Rule in *Bain* v. *Fothergill**	June 1976	*Conveyancing and Law of Property Act*, S.B.C. 1978, c. 16, s. 33 (see now *Property Law Act*, R.S.B.C. 1979, c. 340, s. 33).

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
29	Annual Report, 1976	Dec. 1976	Not applicable.
30	The Rule in *Hollington* v. *Hewthorn**	Jan. 1977	*Evidence Amendment Act, 1977*, S.B.C. 1977, c. 70 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, ss. 15(3), 80, 81).
31	Waiver of Conditions Precedent in Contracts*	Apr. 1977	*Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 49).
32	Proof of Marriage in Civil Proceedings*	Apr. 1977	*Attorney-General Statutes Amendment Act, 1979*, S.B.C. 1979, c. 2, s. 18 (see now *Evidence Act*, R.S.B.C. 1979, c. 116, s. 58).
33	The *Statute of Frauds**	June 1977	———
34	Tort Liability of Public Bodies*	June 1977	———
35	*Offences Against the Person Act, 1828*, Section 28*	Aug. 1977	*Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11, s. 8 (see now *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 3).
36	Annual Report, 1977	Jan. 1978	Not applicable.
37	*Absconding Debtors Act* and *Bail Act:* Two Obsolete Acts*	Mar. 1978	*Attorney-General Statutes Amendment Act, 1978*, S.B.C. 1978, c. 11 s. 8, ss. 1, 2.
38	*The Replevin Act**	May 1978	Rules of Court, Rule 46 as amended Nov. 26, 1981 by B.C. Reg 467/81. *Attorney General Statutes Amendment Act, 1982*, S.B.C. 1982, c. 46, § 3-6, 25, 37-41.
39	The *Attachment of Debts Act**	Oct. 1978	———
40	Execution Against Land*	Oct. 1978	———
41	Annual Report, 1978	Jan. 1979	Not applicable.
42	Creditor's Relief Legislation: A New Approach	Jan. 1979	———
43	Guarantees of Consumer Debts	June 1979	*Consumer Protection Amendment Act, 1980*, S.B.C. 1980, c. 6, s. 3. [in part].
44	Parol Evidence Rule	Dec. 1979	———
45	Annual Report 1979 (Limitation periods in actions against estates)	Jan. 1980	*Attorney General Statutes Amendment Act, 1980* S.B.C. 1980, c. 1, ss. 7, 17. (See now, *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 66(4)(b); *Negligence Act*, R.S.B.C. 1979, c. 298, s. 7(3).).

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
46	Civil Litigation in the Public Interest	June 1980	——
47	Calculation of Interest on Foreclosure	Sept. 1980	*Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 28. (See now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 18.1.).
48	The Recovery of Unauthorized Disbursements of Public Funds	Sept. 1980	*Financial Administration Act*, S.B.C. 1981, c. 15, s. 67.
49	Annual Report 1980 (Discount Rates)*	Jan. 1981	*Attorney General Statutes Amendment Act, 1981*, S.B.C. 1981, c. 10, s. 30. (See now, *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 51).
50	Cable Television and Defamation	March 1981	——
51	Benefits Conferred Under a Mistake of Law	Sept. 1981	——
52	The Making and Revocation of Wills	Sept. 1981	——
53	Distress for Rent	Nov. 1981	——
54	Annual Report 1981	Jan. 1982	Not applicable
55	Arbitration	May 1982	——
56	Presumptions of Survivorship	Nov. 1982	——
57	Crown as Creditor: Priorities and Privileges	Nov. 1982	——
58	Interpretation of Wills	Nov. 1982	——
59	Interest and Jurisdictional Limits in the County and Provincial Courts [Printed as an Appendix to LRC 60]	July 1982	——
60	Annual Report 1982	Jan. 1983	Not applicable
61	Standing of a Common Law Spouse to Apply Under the *Family Compensation Act* [Printed as an Appendix to LRC 73]	Jan. 1983	——
62	Interspousal Immunity in Tort	March 1983	——

* Report is out of print.

No.	Title	Date	Recommendations Implemented in Whole or in Part by
63	Peremptory Challenges in Civil Jury Trials	June 1983	———
64	Breach of Promise of Marriage	Aug. 1983	———
65	Foreign Money Liabilities	Sept. 1983	———
66	Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case	Sept. 1983	———
67	Bulk Sales Legislation	Oct. 1983	———
68	Intentional Interference with Domestic Relations	Nov. 1983	———
69	Illegal Transactions	Nov. 1983	———
70	Statutory Succession Rights	Dec. 1983	———
71	Minor (Interim) Report on the *Land (Wife Protection) Act* [Printed as an Appendix to LRC 73]	Jan. 1984	———
72	Minor Report on The Jurisdiction of Local Judges: Stays of Execution and Instalment Orders [Printed as an Appendix to LRC 73]	Feb. 1984	———
73	Annual Report 1983/84	April 1984	Not applicable

Appendix B

MATTERS UNDER CONSIDERATION BY LAW REFORM COMMISSION OF BRITISH COLUMBIA

1. Debtor-Creditor Relationship Topics
   (a) Reviewable Transactions
   (b) Concurrent Liability
   (c) Court Order Interest
2. Personal Injury Compensation Topics
   (a) Compensation for Non-Pecuniary Loss
   (b) *Family Compensation*
3. Applicability of English Statute Law
4. Civil Procedure Topics
   (a) The Review of Civil Jury Awards
   (b) Settlement Offers
5. Estate Law Topics
   (a) The Effect of Testamentary Instruments
   (b) Practice and Procedure in Estate Matters
6. Contract Law Topics
   (a) Covenants in Restraint of Trade
   (b) Performance Under Protest
   (c) Contractual Mistakes
   (d) Misrepresentation
7. Defamation
8. Mortgage Law Topics
   (a) Mortgages of Land: The Priority of Further Advances
   (b) Personal Liability under a Mortgage or Agreement for Sale
9. Legal Change and Prior Rights
10. I.C.B.C. Exclusions
11. *Land Title Inquiry Act*
12. Family Law Topics

Appendix C

MINOR REPORT (LRC 61)

January 18, 1983

The Hon. Allan Williams, Q.C.
Attorney General of the
Province of British Columbia
Parliament Buildings
VICTORIA, British Columbia
V8V 1X4

Dear Mr. Attorney:

Report No. 61
Standing of a Common Law Spouse to Apply Under the Family Compensation Act

At common law, no right of action existed against a person whose wrongful act, neglect or default caused the death of another: *Baker* v. *Bolton*, (1808) 170 E.R. 1033; *Admiralty Commrs.* v. *S.S. Amerika*, [1917] A.C. 38. The dependants of the deceased could not recover any compensation for their loss. That defect of the common law is corrected by the *Family Compensation Act*, R.S.B.C. 1979, c. 120, which is based upon the English *Fatal Accidents Act*, commonly known as Lord Campbell's Act.

Under the *Family Compensation Act*, an action for damages against the person who caused the deceased's death may be brought on behalf of the deceased's wife, husband, parent, child or person to whom the deceased stood in *loco parentis* (s. 3). "Child" includes a grandchild or stepchild; "parent" includes a grandparent or stepparent (s. 1). The intent of the *Family Compensation Act* is to compensate members of the deceased's family for actual pecuniary loss suffered from the deceased's death, as well as for having been deprived of the deceased's support, guidance, and other monetary and non-monetary contributions he might have made to his family.

There are a number of aspects of the Act and its operation which call for study. These include what the proper basis of compensation should be and who should have status to bring an action. We are currently gathering materials on this topic and some preliminary research has been undertaken.

While we are unable to predict when a comprehensive Working Paper will be prepared, our preliminary work has identified one issue on which we believe immediate action is desirable. That issue concerns the status of a so-called "common law spouse" of the deceased under the Act.

In *Louis* v. *Esslinger; Dunphy et al.* v. *Esslinger*, (1981) 121 D.L.R. (3d) 17 (B.C.S.C.) a recent decision of the Chief Justice of the Supreme Court of British Columbia, it was held that the word "wife" means lawfully married wife. Consequently, a common law wife had no entitlement under the Act to damages for the death of her common law husband. Presumably "husband" means lawfully married husband, with similar consequences. The Chief Justice concluded that if it is desirable for an unmarried person to claim for the loss of the person with whom he or she lives, that right must be created by

legislation. He went on to say that if eligibility under the Act were extended to common law spouses, it would fall to the court to determine the amount of damages to be recovered having regard to the nature of the dependancy, the stability of the relationship, its likely duration, and all other factors that bear upon the question of damages in that class of case.

The increase in common law relationships existing today is a fact to which the law must, we think, have regard. The Commission is aware that many different kinds of relationships and arrangements are embraced by the colloquial term "common law marriage." In many cases a man and woman may co-habit in a relationship which, tacitly or expressly, is understood to be casual or for convenience, and we doubt whether it is desirable or necessary to extend the provisions of the *Family Compensation Act* to those people. Nevertheless, we have concluded that a man and a woman who live together in a relationship resembling, but not sanctioned by, marriage deserve the protection of the Act. In those cases the loss of a common law spouse, in terms of financial and emotional support, may be as grave as if the parties had been married.

Other jurisdictions have already taken this step. Both Ontario and Prince Edward Island permit common law spouses to apply under their fatal accidents legislation. South Australia enacted such legislation in 1975. Similar rights to apply are provided in the Australian Capital Territory and in the Northern Territory. Permitting common law spouses to apply under fatal accidents legislation has been recommended by the Law Reform Commission of Western Australia and the Tasmanian Law Reform Commission. Moreover, the status of common law spouses has been acknowledged in British Columbia under the *Worker's Compensation Act*, the *Estate Administration Act*, the *Insurance (Motor Vehicle) Act*, and the *Family Relations Act*. Sections 17(11), (12) and (13) of the *Worker's Compensation Act* provide:

> (11) Where a worker has lived with and contributed to the support and maintenance of a common law wife, and
>
> (a) where he and the common law wife have no children, for a period of 3 years; or
>
> (b) where he and the common law wife have children, for a period of one year
>
> immediately preceding his death, and where he does not leave a dependent widow, the board may pay the compensation to which a dependent widow would have been entitled under this Part to the common law wife.
>
> (12) Where
>
> (a) a worker has lived with and contributed to the support and maintenance of a common law wife for the period set out in subsection (11);
>
> (b) the worker also left surviving a dependent widow from whom, at the date of death, he was living separate and apart; and
>
> (c) there is a difference in the amount of compensation payable to the widow by reason of the separation and the amount of compensation that would have been payable to her if she and the worker had not been living separate and apart,
>
> the board may pay compensation to the common law wife up to the amount of the difference.
>
> (13) In addition to any other compensation provided, a dependent widow, common law wife or foster mother in Canada to whom compensation is payable is entitled to a lump sum of $500.

Under the *Estate Adminstration Act*, R.S.B.C. 1979, c. 114, s. 85, a common law spouse may apply for maintenance from a deceased spouse's estate. Common law spouse is defined in the Act as follows:

> . . . "common law spouse" means either a person who is united to another person by a marriage that, although not a legal marriage, is valid by common law, or a person who has lived and cohabited with another person as a spouse and has been maintained by that other person for a period of not less than 2 years immediately preceding his death; . . .

Under the regulations enacted pursuant to the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, a common law spouse is entitled to Part VII accident benefits for death, disability, medical, rehabilitation, and funeral expense. The definition used in the regulations (1.02(68)) is as follows:

> . . . "husband, wife, or spouse" means . . . a person with whom the insured lived for the 2 years immediately preceding the accident that gives rise to the claim, and who manifested an intention to continue to live indefinitely as husband or wife of the insured, even though not legally married;

The *Family Relations Act*, R.S.B.C. 1979, c. 121, recognizes the rights of common law spouses to maintenance and support. The following definition is used:

> . . . "spouse" . . . includes . . .
>
> (c) except under Part 3, a man or woman not married to each other, who lived together as husband and wife for a period of not less than 2 years, where an application under this Act is made by one of them against the other not more than one year after the date they ceased living together as husband and wife.

While the Commission has concluded that common law spouses should be entitled to damages under the *Family Compensation Act*, we think some care should be taken to legislatively define in what cases that entitlement should arise. We think that a common law spouse should be entitled to damages under the Act only when the relationship with the deceased was subsisting and of some duration. For consistency with the *Estate Administration Act*, the *Insurance (Motor Vehicle) Act*, and the *Family Relations Act*, therefore, eligibility under the *Family Compensation Act* should depend upon establishing that the relationship with the deceased lasted for a period of not less than two years. It should not be necessary, however, that the relationship have been maintained immediately up to the deceased's death. The *Family Relations Act* recognizes that the rights of a common law spouse persist until within one year of the termination of the relationship. The wrongful act of another should not be permitted to foreclose those rights. Moreover, problems that may arise from establishing whether a common law relationship was subsisting at the time of the deceased's death should be eased by providing that status as a common law spouse persists up until one year after the termination of the relationship. For example, if the common law spouses were separated at the time of the deceased's death, providing that status as a common law spouse continues until one year after the relationship terminated may free the court from inquiring into whether the separation was permanent or temporary. We think the definition to be used in the *Family Compensation Act* should correspond to that provided by the *Family Relations Act*.

The Prince Edward Island *Fatal Accidents Act*, P.E.I.S. 1978, c. 7, s. 1(f), extends eligibility under the Act to dependents. The definition of dependent includes common law spouses as follows:

> (vi) a person of the opposite sex to the deceased not legally married to the deceased who lived and cohabited with the deceased as the spouse of the deceased and was dependent upon the deceased at the time of his death for maintenance and support or who was entitled to maintenance and support under any contract, order or judgment of any court in this province or elsewhere.

We do not think that the definition to be used in British Columbia legislation should require proof of dependency. That is a factor considered by the courts in determining entitlement to damages, not eligibility under the Act.

Prince Edward Island also extends eligibility under the Act to common law spouses who were receiving maintenance from the deceased. We think that that is not desirable and that the Prince Edward Island approach goes too far. Under the British Columbia Act, a former spouse who is receiving maintenance is not eligible for compensation, and there is no reason to prefer a common law spouse over a former lawfully married spouse. Whether a former spouse who received maintenance from the deceased until his death should be eligible for compensation under the Act is a question we hope to examine in a subsequent project when we can devote our resources to a more detailed consideration of the Act.

The Commission recommends that:

1. (a) The *Family Compensation Act* be amended to provide that an action under the Act may be brought on behalf of the deceased's common law spouse.

   (b) For the purposes of Recommendation 1(a) "common law spouse" means a person of the opposite sex to the deceased not legally married to the deceased who lived together with the deceased as husband and wife for a period of not less than two years and whose relationship with the deceased was subsisting within at least one year of the deceased's death.

Any further questions that may arise with respect to determining damages for a common law spouse should be adequately resolved by the current practice of the courts under the *Family Compensation Act* when calculating damages for a husband or wife. Damages should be determined with reference to the nature of the dependency, the stability of the relationship, its likely duration, and all other factors usually considered by the courts in an action under the *Family Compensation Act*.

The last aspect of this reform which we think should be mentioned, but which does not require legislative attention, is how damages should be calculated if the deceased leaves surviving him a wife and a common law spouse (or, perhaps, several common law spouses) who are eligible for compensation under the Act. The Act provides that only one damage award is made, which is divided among those eligible for compensation under the Act. The defendant's liability remains limited to that portion of the deceased's resources which was applied for the benefit of his dependants. Consequently, expanding the class of applicants under the Act will not necessarily increase the defendant's liability. Whether a member of that class is entitled to share in the award, and how large a share that member should have, are questions which must be resolved by reference to the prevailing circumstances. The weighing of competing entitlement of a wife and a common law spouse or several common law spouses to a share in a damage award made under the Act can safely be left to the courts to resolve.

Please accept this letter as Report No. 61 of the Commission recommending changes in the statute law. The recommendations for changes in the law set out in this letter were approved by the Commission at a meeting on the

13th of December, 1982. In conformity with our practice, I have taken the liberty of sending copies of this Report to the following persons in your Ministry: Messrs. Vogel, Adamson, Roger and Copley.

Yours truly,
Hon. Mr. Justice J.S. Aikins
Chairman

JSA/tjl

Appendix D

MINOR REPORT (LRC 71)

January 27, 1984

The Honourable Brian R.D. Smith, Q.C.
Attorney General of the Province of
British Columbia
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

Re: *Minor (Interim) Report on the Land (Wife Protection) Act*

As you are aware, the Commission has recently added to its program a number of topics which fall under the general description of "Family Law." Although the terms of reference for these studies are not yet fully settled, we expect them to include an examination of the operation of those sections of the *Family Relations Act* relating to family property. While we plan to proceed as expeditiously as our resources permit, we are not in a position to say when our final recommendations will emerge. Our preliminary work has, however, identified one area in which early action is called for and we thought it appropriate to bring forward an interim recommendation at this stage.

A statute which pre-dates the present *Family Relations Act*, but nonetheless complements it, is the *Land (Wife Protection) Act*. The aim of the Act is to place limitations on the right of the registered owner of a matrimonial home to sell or encumber it without the consent of the owner's spouse. More specifically, the Act permits the wife to cause a filing to be made in the Land Title office against her husband's interest in the matrimonial home (referred to in the Act as a "homestead"). So long as that filing subsists the husband is limited in the way in which he can deal with his interest in the property. The Act also provides machinery whereby the filing may be cancelled in particular circumstances.

The particular difficulty presented by the Act is that it does not treat husband and wife in an even-handed fashion. The wife is permitted to make a filing against her husband's interest in the matrimonial home, but the husband has no corresponding privilege with respect to the wife's interest. That apparent inequality may not have been a matter of concern at the time the Act was first enacted, but the introduction of the Canadian Charter of Rights and Freedoms as part 1 of *The Constitution Act, 1982* adds a new dimension. Section 15(1) of the Charter provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

That provision comes into force three years after the date the Charter itself came into force [section 32(2)]. That date will be April 17, 1985. Thus, in just over a year, the *Land (Wife Protection) Act* will be liable to be tested under the Charter.

We see a very real danger that the Act, in its present form, would not survive a constitutional challenge under the Charter. None of the "saving" provisions seem applicable (reasonable limits demonstrably justified etc. [section 1] or affirmative action [section 15(2)]). Moreover, the "wife only" approach permeates the drafting of the entire Act. There is no one provision which could be identified and severed by a court to make the statute operate in an even-handed fashion.

Any constitutional challenge to the Act would, therefore, likely result in the Act being struck down in its entirety. In that event, all subsisting filings would cease to have effect and there would be, at best, an unfortunate hiatus while repairs were being made. We therefore believe that immediate action should be taken to amend the Act to preserve it from constitutional challenge. These amendments should take the form of redrafting the Act to the extent necessary to give husbands the same filing privileges which the Act now confers on wives. The redrafted Act might then be enacted as a separate part of the *Family Relations Act*.

We believe these amendments should be regarded as "interim" only. No other changes in principle should be introduced at this time except for the deletion of sections 4 and 5 as recommended in our Report on Statutory Succession Rights (LRC 70). There are a number of modifications to the Act which might be made and require further consideration. The utility of the Act itself calls for scrutiny. The Commission's final recommendations concerning the Act must wait the outcome of its broader examination of family property law.

This letter is to be taken as a minor Report (No. 71) of the Law Reform Commission recommending changes in the law as herein set out. This recommendation was approved by the Commission at a meeting on January 26, 1984.

Yours sincerely,
Arthur L. Close
Vice-Chairman

ALC/ss

Appendix E

MINOR REPORT (LRC 72)

February 20, 1984

The Honourable Brian R.D. Smith, Q.C.
Attorney General of the Province of
British Columbia
Parliament Buildings
Victoria, B.C. V8V 1X4

Dear Mr. Attorney:

Re: *Minor Report on The Jurisdiction of Local Judges: Stays of Execution and Instalment Orders*

A. *Introduction*

The administration of civil justice presents particular problems in a jurisdiction as large and geographically diverse as British Columbia. While there are a number of judicial centres in the Province, the *Supreme Court Act* requires continuous sittings in two locations only: Victoria and Vancouver (section 35). In other places (referred to for convenience as "interior" communities) sittings are governed by section 34:

> **34.** Subject to section 35 sittings of the court for the trial of civil proceedings shall be held at least once a year at each assize town, and at other times as the Chief Justice considers necessary, for the transaction of the court's business.

Thus, in many interior communities a Justice of the Supreme Court is available only when visiting on assize.

In these communities, there is an obvious need for machinery to deal with routine matters and permit Supreme Court litigants to get on with their actions with dispatch and at minimal cost. This need is met in section 11 of the *Supreme Court Act* which clothes County Court Judges with the capacity to exercise certain functions that would otherwise be reserved to a Justice of the Supreme Court. County Court Judges are either resident in most interior communities or are readily available. Section 11 provides:

> **11.** (1) For the purposes of this section, a County Court Judge is a judge of the court and while exercising the jurisdiction of a judge, a County Court Judge shall be called a Local Judge of the Supreme Court of British Columbia.
>
> (2) A local judge has the jurisdiction of the court or a judge
>
> (a) notwithstanding paragraph (c), in a proceeding in the court that could have been commenced in a County Court;
>
> (b) under the *Bankruptcy Act* (Canada) and the *Divorce Act* (Canada); and
>
> (c) under all enactments except this Act, the *County Court Act* and
>
> (i) proceedings under the
>
> [statutes listed]
>
> (ii) trials under the
>
> [statutes listed]

Two features of the jurisdiction of a Local Judge of the Supreme Court might be noted. First, the reference in subsection (2)(c) is to jurisdiction under "enactments." That term, as defined in the *Interpretation Act*, is broad enough to encompass the Rules of Court. Thus, virtually any matter that might be heard by a Supreme Court Justice sitting in chambers may also be dealt with by a Local Judge of the Supreme Court.

A second feature to note is that jurisdiction under the *Supreme Court Act* itself is excluded by excepting "this Act" under subsection (2)(c) from the jurisdiction of a Local Judge. The effect of this is that, apart from section 11, a Local Judge has no jurisdiction under the Supreme Court Act itself. He cannot exercise jurisdiction vested in a Justice of the Supreme Court by any other section.

Our attention has been drawn to section 42 of the Supreme Court Act. It provides:

> **42.** When an order has been obtained for a sum of money, the sum shall be payable immediately unless the court orders otherwise. The court may provide that an order is payable by instalments or may suspend execution for the time it considers proper.

A Local Judge of the Supreme Court, therefore, has no jurisdiction to order a stay of execution or that a judgment be paid by instalments under section 42 (*see Canada Trustco* v. *Internorth*, (1983) 43 B.C.L.R. 388). Such jurisdiction as he has in that regard must, therefore, arise under the Rules of Court.

B. *Stay of Execution: Rule 42(25)*

The authority, in the Rules of Court, for a stay of execution is found in Rule 42(25). It provides:

> (25) (a) The court, at the time of making an order, may stay execution thereon until such time as it thinks fit.
>
> (b) A party against whom an order has been made may apply to the court for a stay of execution or other relief on the ground of facts which have arisen too late to be pleaded, and the court may give relief on such terms as it thinks just.

The effect of this rule is that, except in the narrow circumstances contemplated by paragraph (b), a Local Judge of the Supreme Court may order a stay of execution only at the time an order is made. He appears to have no power after the order has been made, to entertain an application to stay execution. Section 42 of the *Supreme Court Act*, in contrast to Rule 42 (25), contains no temporal restriction. It might also be noted that the corresponding provision of the former Rules of Court was similarly flexible. Paragraph (b) of Marginal Rule 595 provided:

> 595(b) The Court or a Judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit.

This restriction on the powers of a Local Judge is, therefore, of recent origin.

C. *Instalment Orders*

Surprisingly, the Rules of Court appear to contain no explicit provision which clothes the court with jurisdiction to order that the judgment be payable by instalments. There is, however, a procedure provided under the rules whereby a judgment creditor may issue a subpoena to the judgment debtor calling for his appearance before an examiner. The examiner is authorized under Rule 42 (37) (a) to make an order "for the payment of the debt by instalments."

This procedure suffers from two obvious limitations. First, it can be invoked only by the judgment creditor. There is no procedure under the rules whereby the judgment debtor might put the wheels in motion which would result in an instalment order, however much he may be able to justify it. Second, it involves a rather complicated procedure which may not always be appropriate. Many cases might be quickly dealt with through a simple application to the court, either at the time judgment is pronounced or thereafter.

It would appear that only through a highly "creative" interpretation of the power to issue a stay of execution under Rule 42 (25) could a Local Judge make what would be, in effect, an instalment order at the time of judgment. He would have no jurisdiction to entertain an application at a later date.

D. *Analysis*

It has been represented to us that the limitations on the jurisdiction of Local Judges of the Supreme Court with respect to stays of execution, and, to a lesser extent, instalment orders are creating real difficulties for litigants in interior communities where a Supreme Court Justice is not readily available. Urgent cases can only be dealt with by transferring the file to Vancouver or Victoria and bringing the application before a Supreme Court Justice available at one of those locations. This adds considerably to the expense of the application and may result in a delay which, at best, is inconvenient and, at worse, in a critical case could cause genuine hardship.

We are also told that the inability to entertain an application for a stay of execution is particularly critical in the context of mortgage foreclosure proceedings. While the time at which judgment on the personal covenant or guarantee may be taken is not free of doubt, the judgment will commonly be taken at the time the order *nisi* is pronounced (*see* the Honourable Chief Justice of the Supreme Court of British Columbia, "Foreclosure Practice," (1983) 41 Advocate 583). Moreover, in residential foreclosures, the judgment will frequently be pronounced in the absence of the mortgagor. Where a sale of the mortgaged property is, or may be pending, the facts of a particular case may justify a stay of execution until the existence and amount of the deficiency are known. The recent decline in real estate values has led to a situation where the judgment on the covenant is of much greater significance to mortgage lenders than previously.

We believe a good case exists for enlarging the jurisdiction of Local Judges of the Supreme Court with respect to stays of execution and instalment orders. It seems anomalous that, under the Rules, a Local Judge should be given the jurisdiction to pronounce judgment for an unlimited amount (e.g. under Rule 18), but be denied the power to stay execution on such a judgment unless the stay is made contemporaneously with the order. As pointed out above, Local Judges did possess such power until 1976 when the new rules came into force. We are not aware that this jurisdiction led to any difficulties or provided grounds for complaint. The balance of convenience seems clearly to favour the previous rule and we believe the present, more limited, jurisdiction should be enlarged. This conclusion applies with equal force to instalment orders.

If Local Judges were to be given the jurisdiction to stay execution on an application brought forward after the making of the order, a question arises as to the status of paragraph (b) of Rule 42 (25). Strictly speaking, it would become largely redundant. It does, however, provide useful guidance as to particular circumstances in which a stay of execution may be appropriate. Moreover, as it provides for "other relief," it may have a role that goes beyond stays of execution. On the whole, we believe it is worth preserving.

E. *Conclusion*

We believe that the concerns raised in this Report can best be met through an amendment to the Rules of Court. We believe the best approach is to repeal Rule 42 (25) (a) and replace it with a modified version which embodies the

powers provided by section 42 of the *Supreme Court Act*. A complimentary amendment could then be made to Rule 42 (25) (b).

The Commission recommends:

Rule 42 (25) of the Rules of Court be repealed and replaced with a rule comparable to the following:

(25) (a) The court may, at or after the time of making an order,
(i) stay execution thereon until such time as it thinks fit, or
(ii) provide that the order, if for the payment of money, shall be payable by instalments;
(b) Without limiting the generality of paragraph (a), a party against whom an order has been made may apply to the court for a stay of execution or other relief on the ground of facts which have arisen too late to be pleaded and the court may give relief on such terms as it thinks just.

This letter is to be taken as Report No. 72 of the Law Reform Commission recommending changes in the Rules as herein set out. These recommendations were approved by the Commission at a meeting on January 26, 1984. The issue addressed is relatively narrow and uncontroversial and it was the Commission's conclusion that an informal Report by letter was the appropriate way of bringing these recommendations before you.

Yours sincerely,
Arthur L. Close
Vice-Chairman

ALC/ss

Appendix F

COMMISSION WORK REVIEWED AND CITED

Following is a partial list of reviews, articles, books, and cases in which the Commission's work has recently been referred to or discussed.

(a) *Articles and Reviews*

W.A. Bogart, "Review—Law Reform Commission of British Columbia, Report on the Crown as Creditor: Priorities and Privileges," (1984) 48 C.B.R. 181.

L.M. Sherwood, "Contracts—Illegality and Section 305.1 of the Criminal Code," (1983) 61 Can. B. Rev. 866.

F. Meisel, "British Columbia Law Reform Commission Report on Arbitration," [1983] Civ. J.Q. 197.

B.H. Wildsmith, "Report on Civil Litigation in the Public Interest," (1982-83) 7 Dalhousie L.J. 463.

Bowles and Whalen, "Working Paper on Foreign Money Liabilities," (1982) 60 Can. B. Rev. 805.

G.H.L. Fridman, "Law Reform Commission of British Columbia, Competing Rights to Mingled Property: Tracing and the Rule in Clayton's Case, Working Paper No. 36," (1982-83) 7 Can. Bus. L.J. 353.

S.M. Waddams, "Law Reform Commission of British Columbia, Illegal Contracts, Working Paper No. 38," (1982-83) 7 Can. Bus. L.J. 361.

S.M. Waddams, "Foreign Money Liabilities: Law Reform Commission of British Columbia, Working Paper No. 33," (1981-82) 6 Can. Bus. L.J. 352.

F.M. Catzman, "Law Reform Commission of British Columbia, Bulk Sales Legislation, Working Paper No. 40," (1983) 8 Can. Bus. L.J. 109.

G.B. Klippert, *Unjust Enrichment*, Toronto, Butterworth's, 1983 at 152 to 156.

G.H.L. Fridman and J.G. McLeod, *Restitution*, Toronto, The Carswell Company Limited, 1982 at 166 to 172.

(b) *Cases*

Aktary v. *Dobroslavic et al*, (1984) 48 B.C.L.R. 26 (B.C.S.C.).

Sehlstrom v. *Pick*, (1983) 36 C.P.C. 79 (B.C.S.C.).

Air Canada v. *A.G.B.C.*, [1982] B.C.D. Civ. 58.6-04 (B.C.S.C.).

David Grute & Sons Inc. v. *Conbrio Designs Ltd.*, [1982] B.C.D. Civ. 3463-05 (Co. Ct. Van.)

Queen's Printer for British Columbia ©
Victoria, 1984